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IN THE

Supreme Court of the United States

PETER SCHEIBER,

Petitioner,

v.

DOLBY LABORATORIES, INCORPORATED and DOLBY LABORATORIES LICENSING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR MEMORIAL SLOAN-KETTERING CANCER CENTER, ALBERT EINSTEIN COLLEGE OF MEDICINE OF YESHIVA UNIVERSITY, THE RESEARCH FOUNDATION OF STATE UNIVERSITY OF NEW YORK, AND THE ROCKEFELLER UNIVERSITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Although patents are creatures of federal law, contracts for the license of patents exist under and are generally governed by state law. In *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), the Court announced a *per se* rule that such contracts are unenforceable as a matter of federal policy to the extent that they require the payment of royalties on sales made after expiration of the licensed patents. In the present case, the court of appeals strongly criticized *Brulotte* but reluctantly followed the *per se* rule because only this Court can overrule that decision.

This case presents the following question: Should the Court overrule *Brulotte* and hold that such agreements are not *per se* unenforceable as a matter of federal law?

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INTERESTS OF *AMICI CURIAE*

Amici curiae are leading academic research institutions and affiliates. Memorial Sloan-Kettering Cancer Center is the world's oldest and largest private institution devoted to patient care, education, and research into cancer. Albert Einstein College of Medicine is recognized for its strength of research and has six major programs designated as NIH "Centers of Excellence" including in neuroscience, diabetes, liver disease, and sickle cell anemia. The Research Foundation is a nonprofit educational corporation that is responsible for protection and licensing of intellectual property developed by the State University of New York. The Rockefeller University is the oldest biomedical research center in the United States and, having 21 Nobel Laureates among its faculty and students, one of the foremost biomedical research centers in the world.

Although *amici* do not undertake research principally for commercial applications, patentable inventions often result from their research. The goals of *amici* are to assure the utilization of such inventions for the common good and to grant licenses to further their development, which is encouraged by the Bayh-Dole Act. *See* 35 U.S.C. § 200 (2000). Royalties received from such licenses are a vital source of revenue supporting *amici*'s research.[1]

Amici seek to bring to the Court's attention the significant, negative impact that *Brulotte* has on efforts by academic

1. *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. *Amici* are filing this brief with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.

research institutions, and companies to which they license technology, to transform promising research into pharmaceutical products that benefit the public. By making agreements for the payment of royalties that extend beyond the life of the patent unenforceable as a matter of law, *Brulotte* prohibits an important financial arrangement that may be preferred by both parties to license agreements and may deter or inhibit agreements to develop diagnostic or therapeutic products.

STATEMENT OF THE CASE

Petitioner Peter Scheiber ("Scheiber") brought this case against Dolby Laboratories, Inc., and Dolby Laboratories Licensing Corp. (collectively, "Dolby") to enforce a contract for the payment of patent license fees. Pet. App. 2a. Under that contract, Scheiber had licensed his patents to Dolby in exchange for the payment by Dolby of royalties. During negotiations, Dolby proposed to pay a lower royalty rate on sales of licensed products in exchange for a longer royalty term, with payments continuing after expiration of Scheiber's last U.S. patent and ending only upon expiration of his last Canadian patent. Dolby represented that this arrangement would be more palatable to its sublicensees. Scheiber agreed to Dolby's proposal. *Id.*

When Dolby later refused to pay royalties after Scheiber's U.S. patents had expired, Scheiber sued Dolby in state court to enforce the contract; Dolby removed the case to district court based on diversity jurisdiction. *Id.* at 2a, 22a. Relying on *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), the district court granted Dolby's motion for summary judgment, holding that Dolby's agreement to pay royalties beyond the expiration date of the U.S. patents constituted patent misuse and thus was unenforceable as a matter of federal law. Pet. App. at 39a.

The court of appeals affirmed. Writing for the three-judge panel, Circuit Judge Posner explained that the theory underlying *Brulotte* — namely, that post-expiration royalty payments extend the patent beyond the term fixed by statute — was unfounded. *Id.* at 3a. However, the court of appeals held that it was nevertheless bound by precedent to affirm, observing that it has "no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems." *Id.* at 6a.

SUMMARY OF THE ARGUMENT

The well-reasoned opinion of the court of appeals sets forth grounds on which the Court may consider whether to overrule *Brulotte*. As persuasively stated in that opinion, the payment of royalties after a patent expires does not improperly extend the term of the patent because "anyone can make the patented process or product without being guilty of patent infringement" after the patent has expired. Pet. App. at 3a. Such payment terms therefore are not inconsistent with the patent statutes.

Legitimate and important economic considerations support freely negotiated agreements that include post-expiration royalties. For example, such payment terms allow the total consideration paid for a license to be spread out over a longer period and facilitate the sharing of market risk between licensor and licensee. As explained herein by reference to the types of licenses granted by *amici* and other research institutions, there are substantial reasons to accommodate such needs.

Thus, post-expiration royalties may reflect an economically beneficial arrangement that is completely free of improper "monopoly influences." *Brulotte* at 33. The minimal threat that license agreements requiring payment of post-expiration royalties may be used as part of a monopolistic scheme is adequately addressed by the antitrust laws.

The *per se* rule of *Brulotte* stands as an unwarranted barrier to the formation of mutually beneficial, socially desirable agreements that present no threat to competition. *Amici* respectfully submit that the Court should grant the petition, overrule *Brulotte*, and hold that parties may contract for and enforce provisions for post-expiration royalties consistent with the rule of reason under conventional antitrust principles.

REASONS FOR GRANTING THE PETITION

I. The Court Should Overrule *Brulotte*'s *per se* Prohibition Against License Agreements That Require the Payment of Royalties After the Licensed Patents Have Expired

The type of licensing engaged in by *amici* (and other nonprofit academic and research institutions) shows not only why the *per se* rule of *Brulotte* is outmoded, but how this inflexible rule interferes with transactions that are beneficial to the licensor, the licensee, and the general public. For example, *amici* conduct basic research in fields such as cellular biology and immunology. As part of this research, new chemical and biological compounds are synthesized and studied for their effect on different types of cells or cellular responses. Some of these compounds will have effects which indicate that they may be useful as human therapeutics for the treatment of serious diseases.

Academic research institutions can engage in preliminary research to determine the therapeutic potential of these compounds and file patent applications to protect the institutions' rights. However, commercial development of drugs is generally outside the mission of these institutions, which in any event would rarely be able to commit the necessary financial resources to advance development beyond the earliest clinical stages. Thus, development of a potential new drug discovered in a university research lab typically requires the grant of a license under the patent or patent application on that compound to a company with the financial resources and business expertise to undertake such development.

Research institutions and companies generally structure the payments under these license agreements using a combination of: (i) a lump-sum license issuance fee; (ii) milestones paid upon the occurrence of events during development, *e.g.*, the start or finish of different phases of clinical trials; (iii) annual fees for use of the licensed technology; and (iv) running royalties on commercial sales if the resulting product is approved by the Food and Drug Administration for use by the public. Due to the uncertainty of bringing pharmaceutical products to market, including the lengthy FDA approval process, licensees generally prefer to delay payments as long as possible and base those payments on commercial sales.

Thus, although any one of the above-noted types of compensation might theoretically substitute for another in an economic sense, they are *not* equal to most prospective licensees in a business sense. For example, a smaller company may devote nearly all of its available funds to the development of a single promising drug that is a make-or-break opportunity for the company. By contrast, a research institution may

identify a large pharmaceutical company with particular expertise and resources as the firm best positioned to pursue development of a drug candidate, but even large companies are often unwilling to make substantial up-front license payments for what they view as high-risk projects. In these types of situations — which reflect the typical concerns of companies that engage in pharmaceutical-related licensing with institutions such as *amici* — the licensee may strongly prefer to defer a large share of license payments from the development phase (generally within the life of the licensed patent) in favor of royalties on eventual sales that may begin toward the end of the patent term and extend for many years thereafter. A blend of these forms of payment allows recognition of the licensee's desire both to conserve its current financial resources and shift some of the risk of failure to its licensor, which may be especially desirable if the licensee seeks continuing assistance of the licensor's scientific staff to overcome technical hurdles during development. Under these circumstances, it is economically rational and socially beneficial for parties to agree that royalties will be paid for a fixed term starting with the first commercial sale, even if that term extends beyond expiration of the licensed patents.

The issue presented by this case has a substantial impact on the way in which academic research institutions and their licensees will structure new license agreements and perform under existing agreements. *Amici* respectfully submit that there is no sound basis to close-off one avenue of compensation that would be preferred by both sides and also would serve the public interest by permitting academic and research institutions the flexibility to grant licenses to companies they believe are best suited to transform a compound that shows promising results in the laboratory to a drug that saves lives in the hospital.

The issue presented by this case is also of substantial importance to the public at large. Patent licensing by organizations such as *amici* plays an important role in the Nation's economy. According to a report by the Association of University Technology Managers, annual running royalties received by members for intellectual property licenses has consistently increased from $400 million in 1996 to more than $700 million in 2000. *See* Association of University Technology Managers, AUTM Licensing Survey: FY 2000 Survey Summary 12 (2002). That report also states that there have been more than 28,000 licenses and options executed by AUTM members from 1991 to 2000, *id.* at 9-10, and that several thousand new products based on university research were introduced during that period. *Id.* at 2. Congress has recognized the benefits of encouraging the grant of patent licenses by universities and to small businesses, having expressed "the policy and objective of the Congress to use the patent system . . . to promote collaboration between commercial concerns and nonprofit organizations, including universities; [and] to ensure that inventions made by nonprofit organizations and small business firms are used in a manner to promote free competition and enterprise." 35 U.S.C. § 200 (2000) (Bayh-Dole Act). *Brulotte* prevents the use of contractual arrangements between universities and small businesses (as well as large companies) that maximize the potential benefit of the universities' technological advancements.

Amici respectfully submit that *Brulotte*'s blanket prohibition against payment of post-expiration patent royalties should be overruled in favor of a traditional rule of reason analysis under the antitrust laws. As the type of licensing engaged in by academic research institutions such as *amici* demonstrates, post-expiration royalties may reflect economic terms that are

in the mutual best interest of the contracting parties and also in the best interest of the public. Facts such as these represent the antithesis of an improper exercise of market power by the patentee and do not seem to have been contemplated when the Court adopted the *per se* rule of *Brulotte*.

A. Neither the patent statutes nor their underlying policies prohibit all agreements to pay post-expiration royalties

The goal of the patent laws is to "promote the Progress of . . . the Useful Arts" by securing for limited times to inventors the exclusive right to their discoveries. U.S. Const., art. I, § 8, cl. 8. Although Congress has imposed limitations on patent rights, *Brulotte* does not implement them. Indeed, *Brulotte* was not based on any provision of the Constitution or the patent statutes, but rather upon the notion that post-expiration royalties necessarily violate the policy and purpose behind the limitation upon patent term. 379 U.S. at 31-32. The concern was that post-expiration royalties amount to a leveraged use of the patent to assert "monopoly power in the post-expiration period when, as we have seen, the patent has entered the public domain." *Id.* at 33.[2] *Brulotte* is mistaken on this central point.

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2. The use of the term "monopoly" to refer to the exclusive rights conferred by a patent is not strictly correct. *See, e.g.*, Howard Markey, *Why Not the Statute?*, 65 J. Pat. Off. Soc'y 331, 331-33 (1983) (advocating use of statutory language); *see* 35 U.S.C. § 154(a)(1) (2000) (providing that patents grant the right to exclude other from taking certain actions); *In re Kaplan*, 789 F.2d 1574, 1578 n.3 (Fed. Cir. 1986) (explaining that "'monopoly' is used in different senses in patent and antitrust law, hence its ambiguity. Because of its antitrust connotations and association with illegality in connection

(Cont'd)

Post-expiration royalties do *not* extend a patent owner's exclusive rights beyond the term of the patent. A patent grants its owner "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States." 35 U.S.C. § 154(a)(1) (2000). This grant of exclusive rights is for a limited term. *See* 35 U.S.C. §§ 154(a)(2), (b) & (c)(1) (2000); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896) ("It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist. . . ."). Once a patent has expired, the party that owned it has no legal ability to use that patent to enjoin or otherwise restrain others from practicing the invention.

Thus, the payment terms of a license agreement reflect the parties' assessment of the fair value of the use of the claimed invention *during* the patent term. As *Brulotte* itself recognized, the patentee is entitled to receive as compensation for the license whatever amount the licensee is willing to pay. 379 U.S. at 33 ("A patent empowers the owner to exact royalties as high as he can negotiate. . . ."). An agreement to license a patent for consideration that includes the payment of royalties on sales made after the patent has expired does not extend the term of the exclusive rights enjoyed by the patent owner, but instead is a "risk-shifting credit arrangement between the patentee and the licensee." Pet. App. 4a. In other words, the licensee is paying no more than the anticipated value of practicing the claimed invention while the patent is in force. *See* X Philip E. Areeda *et al.*, Antitrust Law ¶ 1782c3 at 507 (1996) (herein Areeda)

(Cont'd)

therewith, it often evokes negative reactions inappropriate to a dispassionate analysis of patent law problems."). Thus, this brief refers to patents as granting "exclusive rights."

("After all, the patentee already charging his profit-maximizing price cannot enlarge profits simply by requiring at the outset that profits be paid for a long period."). As aptly stated by the court of appeals in this case, "[t]he duration of the patent fixes the limit of the patentee's power to extract royalties; it is a detail whether he extracts them at a higher rate over a shorter period of time or a lower rate over a longer period of time." Pet. App. at 4a.

B. The economic theory underlying *Brulotte*'s *per se* rule has been seriously questioned

Leading commentators have rejected *Brullote*'s *per se* rule and the rationale supporting it. For example, Professor Areeda's treatise notes that competitive foreclosure due to post-expiration royalties is barely conceivable, and criticizes *Brulotte* for failing "to see that typically such post-expiration royalties merely amortize the price of using patented technology." X Areeda ¶ 1782c1 at 505. The underlying premise of *Brulotte* has also been criticized because it "ignores that licensees may pay today for what they received yesterday." Harold See & Frank M. Caprio, *The Trouble with Brulotte*: *The Patent Royalty Term and Patent Monopoly Extension*, 4 Utah. L. Rev. 813, 851 (1990). Professor Dreyfuss has criticized *Brulotte*'s reliance on an analogy between extending a patent beyond its term and tying the sale of one product to the sale of another both because the analogy to tying is unsound and because "the leverage theory upon which the tying doctrine rests has come under increasing scrutiny." Rochelle Cooper Dreyfuss, *Dethroning Lear*: *Licensee Estoppel and the Incentive to Innovate*, 72 Va. L. Rev. 677, 709-11 (1986); *see also* Ward S. Bowman, Jr., Patent and Antitrust Law 232 (1973) (criticizing *Brulotte* for relying upon a "leveraging fallacy" instead of the "laudable conception

of a rule of reason"). In addition, Professors Ayres and Klemperer argue that *Brulotte*'s "concern with leverage was misplaced." Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: the Perverse Benefits of Uncertainty and Non-injunctive Remedies*, 97 Mich. L. Rev. 985, 1027 (1999). According to their economic analysis:

> Negotiating a lower per-unit royalty in return for a longer royalty time period is likely to reduce the deadweight loss of supra-competitive pricing. And far from being suspect, the constancy of the royalty over time is prima facie consistent with the Ramsey intuition that the parties would have a joint interest in spreading the distortion evenly across time. Our analysis thus suggests that *Brulotte* should be overruled.

Id. (footnote omitted).

The European Community has also recognized that post-expiration royalties can be economically beneficial, and has rejected a *per se* rule against such contractual arrangements. European competition law generally prohibits agreements that have as their object or effect the prevention, restriction, or distortion of competition within the common market. *See* Treaty Establishing the European Community, Mar. 25, 1957, art. 85(1), 298 U.N.T.S. 11, 47-48. The European Community Technology Transfer Block Exemptions specify that certain exemptions to this general prohibition shall apply notwithstanding that the license contains "an obligation on the licensee to continue paying the royalties . . . over a period going beyond the duration of the licensed patents, in order to facilitate payment." Commission Regulation 240/96,

art. 2(1)(7), 1996 O.J. (L 31) 2, 7-8. This regulation explains that such post-expiration royalty clauses "are generally not restrictive of competition," *id.*, art. 2(1), and that:

> [P]arties must be free, in order to facilitate payment, to spread the royalty payments for the use of the licensed technology over a period extending beyond the duration of the licensed patents, in particular by setting lower royalty rates. As a rule, parties do not need to be protected against the foreseeable financial consequences of an agreement freely entered into, and they should therefore be free to choose the appropriate means of financing the technology transfer and sharing between them the risks of such use.

Id. at 5 (clause 21).

These analyses provide a sound basis on which the Court may reconsider and overrule *Brulotte*. *Cf. State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) ("[T]his Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.").

C. Post-expiration royalties can provide substantial pro-competitive benefits and further the goals of the patent system

There are substantial pro-competitive business justifications for post-expiration royalties. As recognized by the European Community, post-expiration royalties may be an effective way to spread out licensee fees. *See* Commission Regulation 240/96, art. 2(1)(7), 1996 O.J. (L 31) 2, 7-8 (providing a

block exemption for contracts requiring payment of royalties after the expiration of the patent "in order to facilitate payment"). During the initial stages of developing new products based on new technologies, both the product development and marketing costs (as well as the uncertainty as to the value of the invention) are at their highest. *See* Note, *An Economic Analysis of Royalty Terms in Patent Licenses*, 67 Minn. L. Rev. 1198, 1230 (1983) (herein Economic Analysis) ("[U]ncertainty arises because it is difficult to predict the size of the market, how rapidly the market will grow, and the amount potential buyers will be willing to pay."). Thus, post-expiration royalties allow a licensee to delay the payment of license fees until it is in a better position to do so.

Flexible royalty provisions also permit the parties to balance and allocate risk. When the predominant consideration for a license is fixed payments not based on sales — such as up-front payments and periodic license maintenance fees — the licensee bears the risk of product failure because its license payments are fixed. A royalty-based payment system allows the licensor and licensee to share this risk. Providing for a lower royalty rate, typically in exchange for a longer royalty term (that may include post-expiration), further reduces the risk to the licensee. In his dissent in *Brulotte*, Justice Harlan recognized this possible motivation for post-expiration royalties. 379 U.S. at 37-38 (Harlan, J., dissenting) ("If the farmer has no fixed estimate of his use requirements he may have good business reasons entirely unconnected with 'patent leverage' for wanting payments tied to use, and may indeed be willing to pay more in the long run to obtain such an arrangement."). As one commentator noted, the productive gains accruing to small innovators from risk-reducing royalty terms tend to promote competition in the marketplace because

large firms have greater resources to devote to development and can better shelter themselves from risk. *See* Economic Analysis, 67 Minn. L. Rev. at 1233.

The facts at bar provide another example of socially legitimate, economically rational post-expiration royalties. Here, the licensee Dolby itself suggested the payment of post-expiration royalties in exchange for a lower royalty rate, hoping that the lower rate would allow it to "pass on the entire royalty expense to its sublicensees without their balking at the rate." Pet. App. at 2a.

Given the nature of their missions, *amici* and other academic institutions frequently grant licenses to early-stage technology related to products that have not been developed and that are of unknown or speculative commercial value. In such cases, their prospective licensees face a particular risk that no viable product or service will be developed within the scope of the licensed patents. This risk is particularly acute with respect to pharmaceutical innovations, where development costs and failure rates are very high and many years of development, clinical trials, and regulatory review are required before the product ever reaches the commercial market. In circumstances like these, the patent owner has no economic or market power to impose or coerce monopolistic license terms, and the prospective licensee may itself prefer extended royalties in exchange for reduced up-front (or other fixed) payments. The goal of the patent system to "promote the Progress of . . . the Useful Arts," U.S. Const., art. I, § 8, cl. 8, is served by allowing such parties to negotiate freely the license terms that make sense to them in order to maximize the development of desirable (even life saving) products. The *per se* rule of *Brulotte* disserves this goal and serves no comparable goal of its own.

D. Any use of post-expiration royalties for anti-competitive purposes, to the extent that it may be possible, can be policed by application of antitrust law and principles

Should the Court overrule *Brulotte*, agreements for the payment of post-expiration royalties that had true monopolistic effects would still be proscribed by the antitrust laws under a rule of reason analysis. *See* U.S. Department of Justice & U.S. Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.0 (1995) (herein Antitrust Guidelines) ("for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property"). Indeed, the principles for evaluating license agreements under the rule of reason are well-defined. *See id.* § 4.

In some types of cases, the antitrust laws impose a more stringent test such as a *per se* analysis. Under antitrust law, "[p]*er se* treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.' " *State Oil*, 522 U.S. at 10 (quoting *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982)); *see also Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979) ("[I]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . .") (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972)). The judicial experience with post-expiration royalties has not been such as to justify a *per se* prohibition.

Brulotte cited only two cases that could represent evidence that prior decisions or commentators had experience analyzing the competitive impact of post-expiration royalties.

379 U.S. at 31 (citing *Scott Paper Co. v. Marcalus Co.*, 326 U.S. 249 (1945)); *id.* at 33-34 (citing *Ar-Tik Systems, Inc. v. Dairy Queen, Inc.*, 302 F.2d 496 (3d Cir. 1962)). But the first of these did not involve the issue of post-expiration royalties nor cite a single case involving this issue, and the language from it cited in *Brulotte* was *dicta*. *See Scott Paper*, 326 U.S. at 257-58 (holding that an assignor of a patent is not estopped from defending against a suit for infringement of that patent). While the second case cited a few additional decisions that discussed post-expiration royalties, these decisions showed a split of authority and the discussion of post-expiration royalties in most of them was also *dicta*. *See Ar-Tik Systems*, 302 F.2d at 505-08. Thus, the experience with such royalty arrangements does not appear to justify a *per se* prohibition.

If *per se* treatment of post-expiration royalties is not required under the antitrust laws, it is equally inappropriate under the doctrine of patent misuse. From its inception, the goal of the misuse doctrine has been the same as that of the antitrust laws — promotion of competition. *See, e.g., Carbice Corp. v. American Patents Dev. Corp.*, 283 U.S. 27, 33-34 (1931) (affirming dismissal of patent infringement suit and noting that the plaintiff's conduct was "analogous to the use of a patent as an instrument for restraining commerce which was condemned, under the Sherman Anti-Trust Law."). For this reason, it is not surprising that "there is increasing convergence of patent-misuse analysis with standard antitrust analysis." *USM Corp. v. SPS Techs.*, 694 F.2d 505, 511-12 (7th Cir. 1982) ("But apart from the conventional applications of the [patent misuse] doctrine we have found no cases where standards different from those of antitrust law were actually applied to yield different results."). By overruling *Brulotte*, the Court can further this beneficial convergence and clarify

that a conventional antitrust analysis is the best way to determine if particular conduct is patent misuse. *See id.* at 512 ("Our law is not rich in alternative concepts of monopolistic abuse. . . ."); X Areeda ¶ 1781d4 at 492 ("[W]hen antitrust law allows certain conduct because it is pro-competitive, neutral, or insufficiently threatening to competition, we submit that no principle or policy of patent law should condemn such behavior."); Roger B. Anderwelt,*Competition Policy and the Patent Misuse Doctrine*, 25 Pat. Trademark & Copyright J. 41, 42 (Nov. 11, 1982) (speaking as the Chief of the Intellectual Property Section, Antitrust Division, U.S. Department of Justice) ("[W]e should reject improper *per se* misuse rules and prohibit conduct on economic grounds only when economic analysis demonstrates the conduct to be anticompetitive.").

The Court has in modern times brought economic rationality to antitrust law. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (discussing "the general implausibility of predatory pricing"). However, fewer cases involving patent misuse are presented to the Court, and such updated principles have yet to be applied to this doctrine. This case presents a compelling basis for the Court to reconsider *Brulotte* and hold that freely negotiated contracts for payment of post-expiration royalties should be subject to conventional antitrust analysis under the rule of reason instead of the inflexible prohibition of *Brulotte*. The adoption of well-developed antitrust principles to determine if a specific agreement calling for post-expiration royalties constitutes patent misuse will align this doctrine with modern economic understanding and allow the law of patent misuse to grow with the more robust law of antitrust.

CONCLUSION

For the reasons stated above, *amici* respectfully urge the Court to grant the Petition.

Respectfully submitted,

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